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Andrew K. Schiff

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# THE WAR POWERS RESOLUTION: FROM THE HALLS OF CONGRESS TO THE HILLS OF BOSNIA, INERTIA SHOULD GIVE WAY TO POST-COLD WAR REALITY

Andrew K. Schiff

## INTRODUCTION

The deployment of United States ground troops to Bosnia<sup>1</sup> renews the nation's debate<sup>2</sup> over the efficacy of the 1973 War Powers Resolution ("the Resolution").<sup>3</sup> Enacted over a veto by President Nixon,<sup>4</sup> the Resolution continues to befuddle both its advocates<sup>5</sup> and critics.<sup>6</sup> To some,

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\* J.D. candidate, May 1997, Washington College of Law, American University; B.A. 1993, Connecticut College. I would like to thank my family for their unconditional support over the years. I am especially grateful to the *ILJ* editors who worked on my Comment; the mistakes are mine, the coherence is theirs.

1. See John Pomfret, *U.N. Hands Over Its Bosnia Duties to NATO Forces*, WASH. POST Dec. 21, 1995, at A35 (describing the deployment of United States troops to Bosnia).

2. See Michael Dobbs & Thomas Lippman, *Cost of U.S. Bosnia Force Put at \$1.5 Billion*, WASH. POST, Nov. 11, 1995, at A21 (discussing correspondence between President Clinton and congressional Republicans regarding the President's desire for an expression of support and the Republican's desire for congressional authorization); 141 CONG. REC. S16,491-92 (daily ed. Nov. 1, 1995) (statement of Sen. Specter) (disagreeing with premise of sending troops, especially if it is done by unilateral presidential act). *But see* 141 CONG. REC. H11,406 (daily ed. Oct. 30, 1995) (statement of Rep. Lantos) (rising in the "strongest opposition" to a proposed amendment precluding the president from simply assuming that Congress would accede to his wishes regarding troop deployments to Bosnia).

3. The War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1994) [hereinafter "The Resolution"].

4. The Senate vote to override the veto was 75 to 18. 119 CONG. REC. 36,198 (1973). The House vote was 284 to 135 in favor of overriding President Nixon's veto. *Id.* at 36,221. President Nixon responded by stating "[t]he only way in which the Constitutional powers of a branch of the government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force." President's Veto of War Powers Resolution, 9 WEEKLY COMP. PRES. DOC. 1285-6 (Oct. 24, 1973).

5. See, e.g., John W. Rolph, *The Decline and Fall of the War Powers Resolution: Waging War under the Constitution After Desert Storm*, 40 NAVAL L. REV. 85 (1992) (calling the Resolution an "abysmal failure"); Thomas M. Franck & Faiza

the Resolution symbolizes the reassertion of Congress into the war powers debate.<sup>7</sup> To others, the Resolution is nothing more than congressional meddling in an arena where politics<sup>8</sup> and uninformed<sup>9</sup> debate are both unwelcome and counterproductive.

This Comment analyzes the conflicting messages of sections

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Patel, *U.N. Police Action in Lieu of War: The Old Order Changeth*, 85 AM. J. INT'L L. 63 (1991) (arguing the Resolution impinges on the reality of the post-Cold War world, especially in light of the increased role of the U.N.); Thomas M. Franck, *Rethinking War Powers: By Law or by Thaumaturgic Invocation?*, 83 AM. J. INT'L L. 66,769 (1989) (stating the Resolution "has been treated by everyone as if it were a potted plant.").

6. See, e.g., 141 CONG. REC. S18,679, S18,681 (daily ed. Dec. 15, 1995) (statement of Sen. Nunn) (deriding the Powers Resolution as "not sensible" and "[defying] reason"); JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993) (noting that the Resolution has been nearly useless in preventing the executive branch from deploying U.S. forces without congressional authorization); E. FIRMAGE & F. WORMUTH, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986) (arguing that the Resolution serves a critical role in curbing the ability of the executive branch to deploy troops or involve the country in wars without congressional authorization); Brian M. Spaid, Note, *Collective Security v. Constitutional Sovereignty: Can the President Commit U.S. Troops Under the Sanction of the United Nations Security Council without Congressional Approval?*, 17 U. DAYTON L. REV. 1055 (1992) (arguing that United States participation in U.N.-sponsored collective security actions should not come at the expense of the separation of powers between legislative and executive branches envisaged by the Constitution's framers); John H. Ely, *Suppose Congress Wanted a War Powers Act that Worked?*, 88 COLUM. L. REV. 1379 (1988) (arguing to scrap the current Resolution in favor of a more responsive version, in which the judiciary plays a more active role).

7. See 141 CONG. REC. S18,679, *supra* note 6, at S18,679-82 (criticizing the Resolution in its current form but stating that Congress still has an important role to play in the Constitutional debate over their role in overseas troop deployments).

8. See Helen Dewar, *Now It's the GOP Asserting Role for Congress on Foreign Policy*, WASH. POST, Oct. 26, 1993, at A20 (observing that when the GOP held the White House the Democrats clamored for greater congressional control over foreign policy but when the Democrats captured the White House the same representatives attempted to quell the GOP congressional eruption demanding a greater role for Congress in foreign affairs).

9. See *Hearings on Deployment of U.S. Ground Forces in Bosnia Before the House Comm. on National Security*, 104th Cong., 1st Sess., available in 1995 WL 612449 at 17-18 (F.D.C.H.) (1995) (statement of Rep. Spence) [hereinafter *Deployment Hearings*] (relying on a facile and unsophisticated analysis of the Bosnian peace process and the realities of simply throwing subsequent peacekeeping duties onto other countries).

1547(a)(2) and (d)(1) of the Resolution<sup>10</sup> in light of the post-Cold War emergence of the United Nations (the "U.N.") in world affairs.<sup>11</sup> As the Cold War paradigm that governed international relations since the end of World War II fades into oblivion, the vacuum created in its wake has, in large part, been replaced by multilateral<sup>12</sup> actions undertaken pursuant to U.N. Security Council resolutions.<sup>13</sup> The United States, as the world's remaining sole superpower, is often the catalyst for many Security Council actions.<sup>14</sup>

The catalytic process, however, is rarely smooth.<sup>15</sup> During the recent deployment of United States troops to Bosnia,<sup>16</sup> the country's executive<sup>17</sup> and legislative<sup>18</sup> branches of government appeared locked in bipartisan battle, sometimes to the detriment of the Dayton<sup>19</sup> peace process.<sup>20</sup> The conflicting commands in sections 1547(a)(2) and (d)(1) of the Resolution arguably exacerbated this tension.<sup>21</sup> This Comment rec-

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10. The Resolution, *supra* note 3.

11. See *infra* notes 32-34 (discussing specific instances of U.N. involvement in the domestic affairs of member nations).

12. Jack Snyder, *Averting Anarchy in the New Europe*, 14 INT'L SECURITY 42 (1990).

13. For an extensive discussion on the United Nation's response to Iraq's invasion of Kuwait and concomitant resolutions authorized by the Security Council, see *infra* note 112 (describing the twelve U.N. Security Council resolutions authorized in reaction to the Iraqi invasion of Kuwait).

14. See *infra* note 125 (quoting former Secretary of State James A. Baker, III, that the United States, because of its position as the last remaining superpower, must continue to exercise leadership in the international arena in the post-Cold War era).

15. See *infra* notes 142-160 and accompanying text (describing the struggle between President Clinton and Congress which occurred during the period leading up to the Dayton Peace Accords regarding which branch of government has the authority to authorize the deployment to Bosnia).

16. See Pomfret, *supra* note 1, at A35 (describing the deployment of United States troops to Bosnia).

17. See *infra* notes 143-144 and accompanying text (quoting Secretary of State Warren Christopher, Secretary of Defense William Perry, and Chair of the Joint Chiefs of Staff John Shalikashvili during testimony before the House and Senate on President Clinton's authority to deploy the troops, with or without congressional approval).

18. See *infra* note 145 and accompanying text (quoting Chair of the Senate Foreign Relations Committee Jesse Helms admonishing Clinton Administration officials not to deploy troops to Bosnia without congressional approval).

19. See Drozdiak, *infra* note 137 (explaining the Dayton Peace Accords).

20. See *infra* notes 142-160 (discussing the turmoil surrounding the United States troop deployment to Bosnia and the perceived uncertainty this created during the Dayton peace negotiations).

21. See *infra* Section I and notes 50-70 (describing and analyzing the conflicting

ommends and supports a change in the Resolution to diminish these tensions and embrace the post-Cold War reality.

This Comment's Section I investigates in detail the conflicting provisions of sections 1547(a)(2) and (d)(1) of the Resolution. Section II provides an overview of the U.N. as an enforcement mechanism in the post-Cold War world. Section III examines the post-Cold War world, the tragedy of Bosnia, and the important role the United States continues to play in shaping the world's response to a war in Europe's backyard. Section IV revisits the Resolution, further illuminating its shortcomings in the post-Cold War context. Section V, the Recommendation section, analyzes, but ultimately rejects, ideas put forth by Professor John H. Ely and United States Senator Joseph R. Biden. Instead, Section V offers three amendments to make the present Resolution more responsive to the post-Cold War world.

This Comment makes suggestions with an eye toward the post-Cold War world's tectonic shift in international relations and the emerging position of the U.N. in shaping relations among, and between, nations.

## BACKGROUND

Amongst the Resolution's many ambiguities, section 1547 is the most starkly contradictory.<sup>22</sup> In section 1547(a)(2), Congress mandates that any treaty "heretofore or hereafter ratified"<sup>23</sup> should not be construed as granting the President the authority to deploy troops abroad pursuant to the treaty into situations where hostilities either are occurring or are

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commands of sections 1547(a)(2) and (d)(1) of the Resolution).

22. The section states:

Inferences from any law or treaty

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred . . .

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter . . .

(d) Constitutional authorities or existing treaties unaffected . . .

Nothing in this chapter —

(1) is intended to alter . . . the provisions of existing treaties.

The Resolution, *supra* note 3, § 1547(a).

23. *Id.* § 1547(a)(1).

imminent.<sup>24</sup> A latter clause, section 1547(d)(1), appears to repudiate this mandate, stating that "[n]othing in this chapter . . . is intended to alter the provision of existing treaties."<sup>25</sup> Congress, within section 1547 of the Resolution, effectively removes the President's ability to meet the nation's responsibilities under present or future treaties, however, Congress also concurrently allows the President to disregard the mandate for all pre-existing treaties.

The opposing commands of section 1547 are especially troubling in the post-Cold War era. In 1989, the world discarded the bi-polar paradigm that permeated relations between states since World War II.<sup>26</sup> Some commentators argue that a multilateral world now replaces the bi-polar one.<sup>27</sup> In a multilateral world nations utilize international forums and alliances to solve—or at least attempt to solve—disputes as they arise.<sup>28</sup> The most prominent multilateral organization to emerge from the detritus of the Cold War is the U.N.

The U.N. enjoyed a phoenix-like rebirth in the post-Cold War era, its power previously muted amid the Cold War standoff between the Soviet Union and the United States.<sup>29</sup> During the 1991 Persian Gulf War,<sup>30</sup> for example, the allied forces operated under the aegis of U.N. Security Council resolutions condemning the invasion of Kuwait and calling for Iraq's eviction from Kuwait by "all necessary means."<sup>31</sup> Operations in Haiti,<sup>32</sup> Somalia,<sup>33</sup> Cambodia<sup>34</sup> and the former Yugoslavia<sup>35</sup> all

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24. *Id.* § 1547(a)(2).

25. *Id.* § 1547(d)(1).

26. FRED CHERNOFF, *AFTER BIOPOLARITY I* (1995).

27. Snyder, *supra* note 12, at 9.

28. *Id.*

29. See Anthony C. Arend, *The U.N. and The New World Order*, 81 GEO. L. J. 491 (1993) (discussing the promising opportunities and potential pitfalls that confront the U.N. in the post-Cold War world).

30. See RICK ATKINSON, *CRUSADE: THE UNTOLD STORY OF THE PERSIAN GULF WAR* (1993) (detailing the war in the Persian Gulf).

31. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963 mtg., U.N. Doc. S/RES/678 (1990). See *infra* note 112 (describing in detail the purposes of the twelve U.N. Security Council resolutions authorized in reference to Iraq's invasion of Kuwait).

32. JAMES S. SUTTERLIN, *THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL SECURITY* 39-42 (1995). See Douglas Farah, *Helmets Repainted in Haiti but U.N. Can't Paper Over Problems*, WASH. POST, Apr. 2, 1995, at A32 (noting that the transfer of command from United States to U.N. forces also marks the beginning of "a daunting new phase [in Haiti] that will help determine whether the impoverished nation can be a functioning, stable democracy."). The road to success in Haiti, however, is largely contingent on the Haitians rather than the U.N. *Id.*

33. SUTTERLIN, *supra* note 32, at 59-63. For an in-depth analysis of U.N. opera-

demonstrate the post-Cold War emergence of the U.N.'s central role<sup>36</sup> in world events.

Despite the U.N.'s post-Cold War emergence, the war in the former Yugoslavia highlighted one of the forum's most glaring faults: until recently, European negotiators attempted peace efforts in the former Yugoslavia.<sup>37</sup> These forays into the Bosnian tragedy were undeniable failures.<sup>38</sup> After years of hollow promises and worthless cease-fire agreements, it was the leadership of the United States that brought the warring factions to the negotiating table and to peace. The lesson from Bosnia—in addition to the Persian Gulf War—is that without the leadership of the United States, the emerging era of multilateralism is doomed to failure.<sup>39</sup>

According to President Clinton,<sup>40</sup> the United States remains firmly committed to continuing the "new world order" articulated by his predecessor, George Bush.<sup>41</sup> Conversely, Congress remains reluctant to

tions in Somalia, see Sean D. Murphy, *Nation-Building: A Look at Somalia*, 3 TUL. J. INT'L & COMP. L. 19 (1995).

34. Cambodia, once the shining star of U.N. intervention, is currently experiencing incidents, such as "political violence, assassination and repression," signaling that, despite U.N. efforts totaling \$3 billion in over two and one-half years, Cambodia may again be on the road to self-destruction. Keith B. Richburg, *Cambodia Shows Signs of Returning to Old Patterns of Violence, Repression*, WASH. POST, Dec. 9, 1995, at A1.

35. See *infra* Section III.B & C (discussing the necessary engagement of the United States in Bosnia which is then contrasted with the political debate that occurred between Congress and President Clinton over the deployment).

36. This "emergence," however, is not without costs. See John M. Goshko, *Be-leaguered U.N. Struggles to Maintain Peacekeeping Role*, WASH. POST, Oct. 22, 1995, at A24 (noting that with the U.N.'s increasing role as arbiter of the world's flash points comes increasing costs, unmet commitments, and general frustration stemming from perceived failures in Somalia and Bosnia).

37. For example, on May 20, 1993, European Union negotiator Lord David Owen cobbled together a power-sharing agreement between Bosnian Croats and Muslims; less than twenty-four hours later, "fighting between the two factions resumed . . . in Central Bosnia." Jonathan C. Randal, *Muslims, Croats Clash in Bosnia; Fighting Resumes Despite New Pact*, WASH. POST, May 20, 1993, at A27.

38. SUTTERLIN, *supra* note 32, at 98-102.

39. See *infra* Section III.B (discussing the critical role the United States played in the Dayton Peace Accords, which have brought peace, however tenuous, to Bosnia).

40. WILLIAM J. CLINTON, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 1994-1995, 1-13 (1993).

41. See George H. Bush, *Toward a New World Order*, 1 UNITED STATES DEP'T ST. DISPATCH 91 (1990) (describing an era in which nations cooperate on economic, military and political matters).

expand or even continue United States involvement overseas.<sup>42</sup> This conceptual tug-of-war was most pronounced in the debate over the deployment of United States troops to Bosnia. In that instance, Congress threatened to withhold funds unless President Clinton sought prior authorization from Congress.<sup>43</sup> President Clinton, citing his inherent powers under the Constitution, steadfastly refused to submit to authority "pursuant to" the Resolution, instead only agreeing to consult closely and regularly with Congress on the Bosnian deployment.<sup>44</sup> While Congress demanded and the President held firm, the ensuing debate nearly destroyed the only real chance for a sustained Bosnian peace. Once more, Congress and a President faced off over who ultimately controls the ability to deploy United States forces abroad.<sup>45</sup>

The Resolution simply does not work.<sup>46</sup> No President ever fully complied with the Resolution to the extent envisaged by the Congress of 1973.<sup>47</sup> Moreover, and of even greater importance, is Congress' near perfect inability to implement the Resolution to applicable incidents of the type clearly envisaged by the Congress of 1973.<sup>48</sup> This Comment, however, is not a commentary on the broad failings of various sections of the Resolution.<sup>49</sup> This Comment is simply a recognition that just as

42. See Thomas W. Lippman, *Foreign Aid Staff Waits to See What to Subtract*, WASH. POST, Nov. 23, 1995, at A21 (describing severe cutbacks in the budgets of numerous federal agencies working on foreign aid issues).

43. See Helen Dewar & Michael Dobbs, *House Votes to Bar Sending Troops to Bosnia Without Hill Approval*, WASH. POST, Nov. 18, 1995, at A22 (describing congressional actions aimed at preventing the President from unilaterally deploying ground troops to Bosnia).

44. *Deployment Hearings*, *supra* note 9, at 31-33.

45. See *infra* Section IV.B and accompanying text.

46. 141 CONG. REC. S18,681, *supra* note 6, at S18,681.

47. The Resolution, *supra* note 3, § 1541(a) states:

It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such circumstances.

48. The Resolution, *supra* note 3, § 1547(a). See *infra* note 157 (discussing, *inter alia*, the examples of the hostage rescue attempt in Iran, the invasions of Grenada, Panama, and Iraq, and the retaliatory attack on Libya, as examples of congressional inaction in the face of clear involvement of United States forces' in hostilities abroad).

49. See *supra* note 5 (discussing the failure of the Resolution as effective law). But see *supra* note 6 (discussing the importance of improving the Resolution because



the ebbs and flows of international relations change, so, too, should the laws that govern the foreign policy of the world's sole superpower.

I. HAVING IT BOTH WAYS:  
THE CONFUSING PATHS OF SECTIONS 1547(a)(2) AND SECTION  
1547(d)(1) OF THE WAR POWERS RESOLUTION

A. SECTION 1547(a)(2)

Among the Resolution's various confusing<sup>50</sup> and potentially unconstitutional<sup>51</sup> clauses, none are as contradictory as two subsections within section 1547. Under the heading of "Interpretation of Joint Resolution," Congress attempts to flesh out the areas to which the Resolution applies.<sup>52</sup> In subsection (a)(2), Congress states that "... any treaty heretofore or hereafter ratified"<sup>53</sup> will not be considered proper authorization for the introduction of United States combat forces into a situation where hostilities are either occurring or imminent.<sup>54</sup>

In the language following the prohibition on treaty-based deployments,

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of its value in the Constitution's separation of powers).

50. See Joseph R. Biden, Jr. & John R. Ritch, III, *The War Powers at a Constitutional Impasse: A Joint Decision Solution*, 77 GEO. L.J. 367 (1988) (describing in great detail the many shortcomings of the Resolution).

51. See ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 109-119 (1991) (arguing that section 2(c) [defining the areas in which the president may deploy forces], section 3 [consultations in every possible instance], section 4 [reporting requirements], section 5(b) [time limitations], and section 5(c) [legislative veto provision] are all of questionable constitutional authority).

*But see* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 101-03 (1984) (arguing that the Resolution is within Congress constitutional power pursuant to Article I, section 1547, clause 11). Carter puts forth a simple yet persuasive argument: The power to "declare war" clearly and unambiguously resides with the Congress. *Id.* The Resolution is "nothing more or less than a congressional definition of the word 'war.'" *Id.* Therefore, rather than reserving for itself what some have argued to be new powers under the war making clause of the Constitution, Congress, instead, promulgated the Resolution in an effort to define that which the Founding Fathers had provided for in the Constitution: the power to declare war. *Id.*

52. The Resolution, *supra* note 3, § 1547(a).

53. *Id.* § 1547(a)(2).

54. *Id.*

Congress permits such deployments “[if such a] treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this chapter.”<sup>55</sup> If a mutual defense treaty is activated, any United States troop deployment would require congressional authorization, specifically pursuant to the Resolution.<sup>56</sup> Congress, while not completely rejecting America’s obligations under its numerous mutual defense treaties, reserved a role for itself in the event the war-making provisions of those treaties are activated and the possibility arises where United States troops are to be sent abroad.

#### B. SECTION 1547(d)(1)

The Resolution reads with equal clarity in section 1547(d)(1).<sup>57</sup> This subsection states, *inter alia*, “[n]othing in this [joint resolution] is intended to alter . . . the provisions of existing treaties . . . .”<sup>58</sup> Read by itself, section 1547(d)(1) appears to preclude altering any and all provisions of existing treaties to which the United States is a signatory. In fact, Congress must have believed the provision spoke with a clear voice for neither the Senate nor House committee reports on the Resolution hearings even mention section 1547(d)(1).<sup>59</sup>

#### C. ANALYSIS

Congress removed the presidential prerogative to deploy United States combat forces pursuant to an existing or future mutual security treaty.<sup>60</sup> Congress inserted a caveat allowing such a deployment if implemented specifically pursuant to the requirements set forth in other sections of the Resolution.<sup>61</sup> Congress then exempted all existing treaties from the Resolution.<sup>62</sup>

To further confuse the issue, the legislative history of the Resolution

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55. *Id.*

56. *Id.*

57. The Resolution, *supra* note 3.

58. *Id.*

59. War Powers Resolution, H.R. REP. NO. 287, 93rd Cong., 1st Sess. (1973), *reprinted in* 1973 U.S.C.A.N. 2346, 2357 [hereinafter “War Powers Report”].

60. The Resolution, *supra* note 3, § 1547(a).

61. *Id.* § 1547(a)(2).

62. *Id.* § 1547(d)(1).

raises additional problems. The House Report ("Report") provides a section-by-section analysis of the Resolution. Under section 1547, the Report notes that, "... [section 1547(a)(2)] reassures United States allies that passage of the resolution will not affect United States obligations under mutual defense agreements and other treaties to which the United States is a party."<sup>63</sup> Far from reassuring our allies, this explanation can only serve the opposite function. The explanation calls into question the sustainability of any United States troop deployment pursuant to a mutual defense treaty.<sup>64</sup>

Section 1547(a)(2) does not "reassure United States allies"<sup>65</sup> that America's obligations under previous treaties will remain unaffected. Instead, section 1547(a)(2) of the Resolution promotes insecurity among our signatory partners in two ways. First, other states, rather than counting on the United States to deploy its forces pursuant to a treaty obligation for the duration of the crisis, will only be able to count on United States forces for a maximum of sixty days<sup>66</sup> before the forces risk withdrawal in the face of congressional opposition.

Second, the caveat in section 1547(a)(2)—allowing the deployment of troops pursuant to a mutual defense treaty as long as the deployment is conducted with specific authorization under the Resolution<sup>67</sup>—offers little solace. Far from a grant of power, the caveat is premised on removing the President's authority to deploy forces in response to treaty obligations. The caveat reinforces the new uncertainty section 1547(a)(2) introduced into the treaty equation by placing the decision to respond to treaty-involved crises in the hands of Congress rather than the treaty

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63. War Powers Report, *supra* note 59, at 2357.

64. Though admittedly over-simplified, the President, under the War Powers Resolution, may deploy United States armed forces abroad for up to sixty days without congressional authorization. The Resolution, *supra* note 3, at § 1544(b). At the end of the sixty days—assuming the President has conformed to various reporting procedures—the President must either bring home the troops or request a thirty day extension. *Id.* If, at the end of the ninety day period (or sixty days if Congress refuses the extension application), Congress has failed either to declare war or specifically authorize the deployment, Congress can, in theory, force the President to withdraw the troops. *Id.* § 1544(c). This section also allows Congress to direct the President to remove the forces any time "that United States Armed Forces are engaged in hostilities outside the territory of the United States." *Id.*

65. War Powers Report, *supra* note 59, at 2357.

66. If Congress is against a war, it would not grant the President a thirty day extension. Therefore, the maximum number of days an ally could count upon United States troops before Congress could force a recall is sixty days. *Id.*

67. The Resolution, *supra* note 3, § 1547.

provisions.

The language of section 1547(d)(1) balances the destabilization introduced with section 1547(a)(2).<sup>68</sup> Though not discussed in the legislative history, section 1547(d)(1) appears to serve as the "reassuring" mechanism the drafters attempted to assign to section 1547(a)(2). For with the clear and concise prose of section 1547(d)(1), Congress exempts all provisions of existing treaties from the reach of the Resolution.<sup>69</sup> With this clean sweep, Congress expresses the exact opposite position previously iterated in section 1547(a)(2).<sup>70</sup>

## II. THE U.N. CHARTER & ARTICLE 42: WORTHLESS UNDER WAR POWERS RESOLUTION SECTIONS 1547(a)(2) AND (d)(1)?

Under Article 1 of the U.N. Charter (Charter), the first purpose of the U.N. is to "maintain international peace and security, and to that end: to take effective *collective measures* for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . . ."<sup>71</sup> "Collective measures" refer to a general security paradigm known as collective security.<sup>72</sup> Under a collective security agreement, a group of nations, in this case parties of the U.N. charter, agree not to use military force to settle disputes between parties. If a party or non-party violates an agreement, all of the signatories must participate in punishing the aggressor. In many cases, such punishment can take the form of military action. In a collective security agreement every party, regardless of their national interest, must assist in restoring the status quo. U.N. Article 42 enforces this mandate.<sup>73</sup>

68. Section (d)(1) allows for the continued efficacy of "existing treaties," thereby neutralizing the language in subsection (a)(2) which eviscerates the provisions of treaties "heretofore or hereafter ratified." *Id.*

69. *Id.* § 1547(d)(1).

70. *Id.*

71. U.N. CHARTER art. 1, para 1. (emphasis added)

72. See Richard K. Betts, *Systems for Peace of Causes of War?*, 17 INT'L SECURITY 6-12 (1992) (defining "collective security"); Josef Joffe, *Collective Security and the Future of Europe*, 34 SURVIVAL 36-37 (1992) (same); Charles A. Kupchan and Clifford A. Kupchan, *Concerts, Collective Security and the Future of Europe*, 16 INT'L SECURITY 116-24 (1991) (same).

73. Article 42 of the U.N. Charter provides:

Should the Security Council consider that measures provided for in Article 41 [which are primarily designed to use economic or other non-military means to settle disputes] would be inadequate or have proved to be inadequate, it may

Article 42 authorizes the Security Council to take military action in furtherance of the U.N.'s primary purpose.<sup>74</sup> Should sanctions or similar actions fail to address an international crisis, the Security Council may authorize military action to restore the status quo.<sup>75</sup>

The legislative history of Article 42 is replete with references to the exciting new era in international relations that the U.N. drafters envisaged following the Second World War.<sup>76</sup> With an eye toward history, the drafters sought to avoid what many considered to be the primary pitfall of the League of Nations;<sup>77</sup> namely, the League's inability to compel its signatories to commit troops to combat acts of aggression against other members.<sup>78</sup> By adopting Article 42, the U.N. created a system whereby "military assistance, in case of aggression, ceases to be a recommendation made to member states; it becomes for us an obligation which none can shirk."<sup>79</sup> Accordingly, the U.N. Charter contains Chapter VII, which "provides the teeth for the U.N."<sup>80</sup> By authorizing the Security Council to act militarily, the ambivalence and ambiguity that paralyzed the League of Nations would not be realized.<sup>81</sup> In its place, a well-defined obligation existed from which substantive and final decisions would emanate.

Then Secretary of State for the United States, Edward Stettinius,

take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea or land forces of Members of the United Nations.

74. U.N. CHARTER art. 42. *See supra* note 73 and accompanying text (detailing the principle purpose of U.N. Article 42).

75. Contributions to an Article 42 force are drawn from members under provisions set forth in Articles 43 and 45 of the U.N. Charter.

76. *See generally* Franck & Patel, *supra* note 5 (describing a system in which the old order of international conflict—unilateral war and reaction thereto—would be replaced with a new paradigm in which multilateral police actions, pursuant to Article 42 of the U.N. Charter, would be the primary means by which international conflicts would be resolved).

77. For a discussion on the failure of the League, see generally GEORGE SCOTT, *THE RISE AND FALL OF THE LEAGUE OF NATIONS* (1973).

78. *Id.* at 403-4.

79. *See* Franck & Patel, *supra* note 5, at 65 (quoting Doc. 881, III/3/46, 12 UNCTO Docs. 765, 769 (1945)).

80. *The Charter of the United Nations: Hearings Before Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess. 87 (1945) (statement of Edward R. Stettinius, Jr.) [hereinafter *United Nations Hearings*].

81. *See generally* SCOTT, *supra* note 77 (discussing the failure of the League of Nations).

stated that by adopting the Charter the nations of the world agreed, "to provide armed forces to an international agency that would be able to use them to preserve world peace and security."<sup>82</sup> The Secretary further noted that the United States, by adopting the Charter, agreed to the "new world order" that would "constitute concrete evidence of the recognition . . . that its own security is founded upon its cooperation with other countries in the maintenance of world peace."<sup>83</sup>

Neither the Secretary of State, nor the U.N., however, may speak authoritatively for the United States Congress. Without the approval of Congress, the United States could not be a signatory to the U.N. Charter.<sup>84</sup> Without the United States, the U.N. was bound to fail. Furthermore, without the provisions of Article 42, the U.N. would result in the same paper tiger as the League of Nations.<sup>85</sup>

The United States Congress, therefore, needed to address the potential new era of international relations. Instead of remaining locked in the pre-World War II era of unilateral war and the failed policies of the League of Nations, Congress grasped the opportunity to embrace the concept of collective security enshrined in the U.N.<sup>86</sup>

A pointed exchange, however, occurred between Senators Millikin and Vandenberg. Senator Millikin wanted Congress to reserve the right to approve United States troop deployment every time the Security Council utilized an Article 43<sup>87</sup> resolution. Senator Vandenberg, speaking for a

82. *United Nations Hearings*, *supra* note 80, at 87 (statement of Edward R. Stettinius, Jr., Secretary of State).

83. *Id.*

84. U.S. CONST. art. II, § 2, cl. 2: "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . ."

85. *See generally* SCOTT, *supra* note 77 (discussing the failure of the League of Nations).

86. Franck & Patel, *supra* note 5, at 66 n.15 (citing STAFF COMM. ON FOREIGN RELATIONS, 79th CONG., 1st SESS., REPORT ON THE CHARTER OF THE U.N. (Comm. Print 1945)).

87. U.N. CHARTER art. 43. Article 43 is a three-part grant of power to the Security Council, creating an on-call reserve force, available for use in situations identified in Article 42. *Id.*

Professors Franck and Patel construct a persuasive argument regarding the failure of the U.N. to pursue the options discussed in Article 43. Franck & Patel, *supra* note 5, at 66. Briefly, they contend that a literal and narrow reading of the U.N. Charter is as ill conceived as the same type of exercise aimed at the United States Constitution. *Id.* They contend that regardless of the failure of nations to pre-commit forces to Security Council authority under Article 43, the "organic growth and the alternative creation of police actions through invocation of Article 42" has served to

majority of the senators, responded:

I think that if we were to require the consent of Congress to every use of our armed forces, it would not only violate the spirit of the Charter . . . but it would violate the spirit of the Constitution . . . because . . . the President has certain rights to use our armed forces in the national defense without consulting congress.<sup>88</sup>

Though uttered over 50 years ago, Senator Vandenberg's point is of critical importance today. For if United States troops can be deployed pursuant to a U.N. request without congressional authorization, where does the Resolution stand?

While the Resolution was nearly 30 years from inception, the National Security Committee's report provided powerful evidence that military actions taken by the United States under the auspices of the U.N. should be distinct from those taken unilaterally.<sup>89</sup> Pursuant to powers articulat-

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supplant Article 43. *Id.* To support their contention, they quote Judge Spender:

A general rule is that words used in a treaty should be read as having the meaning they bore therein when it came into existence. *But this meaning must be consistent with the purpose sought to be achieved.* Where, as in the case of the [U.N.] Charter, the purposes are directed to saving succeeding generations in an indefinite future from the scourge of war, . . . the general rule above stated does not mean that the words in the Charter can only comprehend such situations and contingencies and manifestations of subject-matter as were within the minds of the framers of the Charter.

*Id.* (citing *Certain Expenses of the U.N.*, 1962 I.C.J. 151, 186 (Advisory Opinion of July 20) (Spender, J., sep. op.)) [emphasis added].

Franck and Patel interpret broadly Judge Spender's remarks. They contend that just as the U.N.'s failure to enact Article 43 agreements does not invalidate the entire debate on collective security, Congress' debate over the efficacy of Article 43—and not Article 42, the modern incantation of the U.N. police actions—should similarly fail to destroy the import of the supportive language used by the Congress in reference to Article 43 and the new era in international relations it was supposed to bring about. *Id.* at 66.

88. *United Nations Hearings*, *supra* note 80, at 299.

89. *Report Providing for the Appointment of Representatives of the United States in the Organs and Agencies of the U.N., and to Make Other Provisions with Respect to the Participation of the United States in Such Organization*, S.REP. NO. 717, 79th CONG., 1st Sess., 8 (1945). The committee noted:

[T]he committee is convinced that any reservation to the Charter, or any subsequent congressional limitation designed to provide, for example, that employment of armed forces of the United States to be made available to the Security Council under special arrangements referred to in article 43 could be authorized only after the Congress had passed on each individual case would clearly violate the spirit of one of the most important provisions of the Charter. One of

ed in the U.N. Charter, the senators believed that the president could deploy forces without the worry of congressional micro-management, if executed pursuant to a Security Council resolution.<sup>90</sup> Furthermore, Congress distinguished police actions from war,<sup>91</sup> the latter requiring congressional authorization.<sup>92</sup>

On the senate floor, a "large majority of the senators . . . seemed to understand that the United States was joining a new order."<sup>93</sup> Only a small group of senators rejected the concept of joining a collective security organization.<sup>94</sup> Senator Bushfield argued that Article 42 violated the Constitution because it proposed to "delegate to the Security Council of the New League of Nations [*sic*] the power to declare war and the power to take American boys into war anywhere in the world without the approval or consent of the Congress."<sup>95</sup> Advocates of the "new world order" won the day, though, and Congress ratified the U.N. Charter treaty.

Congress articulated similar dichotomous views in the debate sur-

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the fundamental purposes of the Charter is to provide forces which will be immediately available to the Security Council to take action to prevent a breach of the peace. Moreover, if a reservation to this effect were to be adopted by the Senate, the very nature of the Charter itself would be changed, and further negotiations with the other signatories of the Charter would unquestionably be necessary.

Preventive or enforcement action by these forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of Congress to declare war.

The committee feels that a reservation or other congressional action such as that referred to above would also violate the United States Constitution under which the President has well established powers and obligations to use our armed forces without specific approval of Congress.

The special position of the United States as on the five permanent members of the Security Council whose approval is needed for any enforcement action needs to be emphasized once again in this connection. No United States forces can be employed, no enforcement action of any kind against any nation breaking the peace can be taken, without the full concurrence of the United States acting through its delegate on the Security Council.

90. *Id.*

91. *United Nations Hearings*, *supra* note 80, at 9.

92. U.S. CONST. art. I, § 8, cl. 11.

93. Franck & Patel, *supra* note 5, at 68.

94. *Id.*

95. *Id.* at 69 (*citing* 91 CONG. REC. 7,156 (1945)).



rounding the 1945 U.N. Participation Act [UNPA].<sup>96</sup> In section 287(d) of the UNPA, Congress allows the President to enter into negotiations with the Security Council in order to determine the "numbers and types of armed forces, their degree of readiness . . . to be made available to the Security Council on its call . . . [in] accordance with Article 43<sup>97</sup> of the U.N. Charter."<sup>98</sup> Congress, however, inserted a provision requiring congressional approval before the Article 43 agreement could become law.<sup>99</sup>

Congress was unclear when it authorized both the U.N. Charter and the UNPA. Sections 1547(a)(2) and (d)(1) of the Resolution are mutually inconsistent; one section virtually repealed all previous treaties to which the United States was a signatory, while the other section effectively granted a pardon to all previous treaties.<sup>100</sup> A president searching for guidance could not find it in the Resolution.<sup>101</sup> In the post-Cold

96. The United Nations Participation Act, 22 U.S.C. §§ 287-287(e) (1988) [hereinafter UNPA].

97. See Franck & Patel, *supra* note 5, at 66 (explaining why the post-World War II references to Article 43 of the U.N. Charter and the post-Cold War reality of U.N. actions under Article 42 of the same are not, by themselves, grounds for dismissing Article 43 arguments made by the commentators during nascent stages of the U.N.).

98. UNPA, *supra* note 96, at §287(d).

99. *Id.*

100. See *supra* notes 50-70 and accompanying text (discussing sections 1547(a)(2) and (d)(1) of the Resolution and the dichotomous demands of the statutes).

101. Franck and Patel offer a compelling answer regarding the battle between the U.N. Charter and the Resolution. Franck & Patel, *supra* note 5, at 72-3. In *U.S. v. The Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988), the United States was accused of violating the U.N. Charter by closing the Observer Mission of the P.L.O. The action was taken in response to the Anti-Terrorism Act, in which Congress had "explicitly found the P.L.O. to be a terrorist organization and had prohibited its activities within the United States." Franck & Patel, *supra* note 5, at 73. When statutes and treaties contradict each other, the Supreme Court has held that "[i]t has been a maxim of statutory construction since the decision in *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), that 'an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains.'" P.L.O., 695 F. Supp. at 1465 (quoting *Weinberger v. Rossi*, 456 U.S. 23, 32 (1982)). The Court held, *inter alia*, that since the Anti-Terrorism Act does not specifically refer to the U.N. Headquarters Agreement (from which the PLO derived the power to establish an Observer Mission), the government cannot apply the Act in violation of the U.N. Agreement. *Id.* at 1468. The Court denied the U.S. motion for summary judgment, granted the P.L.O. motion for summary judgment and dismissed the action with prejudice. *Id.* at 1471-72.

From this, Franck and Patel observe:

Applying [this ruling] to the War Powers Act, it is evident that Congress did

War era of international relations—an era which holds true promise for greater international cooperation among U.N. members—the Congress of the most powerful and important member of the U.N. *must* speak with a more definitive voice. An in-depth examination of this emerging era in international relations will provide the impetus for change.

### III. THE NEW WORLD ORDER

#### A. SETTING THE STAGE FOR MULTILATERALISM

On March 5, 1946, British Prime Minister Winston Churchill delivered his Iron Curtain speech,<sup>102</sup> effectively declaring the Cold War a reality. On April 2, 1989<sup>103</sup> the *New York Times* declared the Cold War over: “The we-they world that emerged after 1945 is giving way to the more traditional struggles of great powers . . . [i]t creates new possibilities—for cooperation in combating terrorism, the spread of chemical weapons and common threats to the environment, and for shaping a less violent world.”<sup>104</sup>

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not speak unambiguously about treaty obligations in general, given the contradictory messages in subsections 8(a) and (d). Specifically, however, there is neither textual nor contextual evidence demonstrating that Congress intended to rescind the obligation of the United States to carry out the decisions of the Security Council under Article 42.

Franck & Patel, *supra* note 5, at 73.

While this argument is persuasive, it is also incomplete. The debate over the future of the Resolution requires more power than a legal argument based on one case. Beyond authors Franck and Patel, the debate should be grounded in post-Cold War reality, the details of which are discussed below in the text.

102. Paul Liben, *Will the Iron Curtain Descend Again?*, WALL ST. J., March 5, 1996, at A14. In his famous speech Churchill observed,

From Stettin in the Baltic to Trieste in the Adriatic, an Iron Curtain has descended across the Continent. Behind that line lie all the capitals of the ancient states of Central and Eastern Europe. Warsaw, Berlin, Prague, Vienna, Budapest and Sofia, all these famous cities and the populations around them lie in . . . the Soviet sphere.

103. *The Cold War is Over*, N.Y. TIMES, Apr. 2, 1989, at E30. Cf. Richard Holbrooke, *America, A European Power*, 74 FOREIGN AFF. 2, 38 (1995) (dating the end of the Cold War “to that symbolic moment at midnight on December 25, 1991, when the Soviet flag came down over the Kremlin for the last time.”).

104. *The Cold War is Over*, *supra* note 103, at E30. See Michael Dobbs, *Changes Prove to Be Bonus for Gorbachev*, WASH. POST, Nov. 10, 1989, at A1 (discussing the grand tide of political reform that swept through Eastern Europe and the Soviet

What was true 1989 is even more applicable today. The Cold War, and all of the ills and associated threats that came with it, is history.<sup>105</sup> More importantly, there are substantial reductions in the number of nuclear and conventional weapons deployed by both sides and a near stoppage in the production of new nuclear<sup>106</sup> and conventional platforms.<sup>107</sup> The world, in a very real sense, is a much safer place

Union's lack of interference in those events); Stephen S. Rosenfeld, *Groping for Stability*, WASH. POST, Nov. 10, 1989, at A27 (noting the instability created across Europe as the Soviet Union began to crumble, most especially in regard to a new, resurgent Germany following the liberation of East Germany and the possibility of ethnic strife arising from centuries of ethnic hatreds in other Eastern European countries).

105. See *supra* note 103 (discussing the end of the Cold War).

106. See John Barry, *Russia's Nuclear Secrets*, NEWSWEEK, Feb. 12, 1996, at 36 (reporting that Arzamas-16, the top secret "main nuclear weapons design center" of the former Soviet Union, and its United States corollary, Los Alamos, have grown increasingly interconnected in the years following the Cold War, to the point that "Los Alamos and other nuclear labs run by the U.S. Department of Energy provide an estimated 10 percent of Arzamas's operating budget.").

107. For a devastating article regarding the seriously depleted state of Russia's conventional arsenal, see Benjamin S. Lambeth, *Russia's Wounded Military*, 74 FOREIGN AFF. 86 (March/April 1995) (describing a massive and near irreversible decline in the quality and quantity of weaponry available to post-Soviet Russia). Lambeth explains:

[B]ecause the U.S.S.R. had been strategically oriented toward the west, most of Russia's best military equipment was deployed beyond the western-most borders of the Russian Federation . . . . Moscow forfeited its prized assets in Ukraine and Belarus when the union fell apart. Little more than half the combat aircraft of the Soviet air force remained within the boundaries of post-Cold War Russia. Russia lost four of every five Soviet repair facilities for armored fighting vehicles. As a result, only 20 percent of the tanks inherited by the Russian army remained serviceable by early 1994 . . . .

The air and air defense forces . . . typically bought about 450 new fighter aircraft a year during the mid-1980s. By contrast, they acquired only 23 in 1993 and 1994 combined, not enough even to replace aircraft lost in routine accidents . . . .

Russia's fighter pilots are now logging on average no more than 25 flying hours a year, a dismal contrast to the training norms of Western powers, which range from 180 to 220 hours . . . .

There have been no ground exercises at the divisional level . . . since 1992. Not even the best army divisions are fully manned and equipped. The surface navy rarely puts to sea because of insufficient funds for fuel. The exercises conducted and reviewed during the 1993 training year complained . . . the Chief of the General Staff, revealed poor command preparation, deficient knowledge of operational procedures, and an alarming buildup of unserviceable equip-

then it was just six years ago.<sup>103</sup>

That is, of course, unless one resides in Kuwait or Sarajevo. Iraq's naked aggression, coupled with the Balkan war's unspeakable brutality, serve as reminders that the end of the Cold War did not usher in world-wide peace and tranquillity. Post-Cold War ills notwithstanding, however, the bipolar retreat from nuclear confrontation heralded in an astonishing revision in the way former enemies viewed one another less than two years after the fall of the Berlin Wall.<sup>109</sup>

ment . . . .

Today it is unlikely that Russia, with its decimated and poorly supported conventional forces, could mount a large-scale cross-border operation against a well-equipped opponent. Its logistical system has been stretched to the breaking point just to sustain some 40,000 troops bogged down in Chechnya.

*Id.* at 88-90.

In contrast, the United States military deployed over 500,000 troops, thousands of aircraft, and six carrier battle groups to the Persian Gulf region in 1990-91, where it supported them through Operation Desert Shield and six weeks of battle in Operation Desert Storm. *See generally* ATKINSON, *supra* note 30 (detailing the Persian Gulf War).

108. *See* Zbigniew Brzezinski, *A Plan for Europe*, 74 FOREIGN AFF. 1, 34 (1995) (noting that neither NATO nor any prospective members—i.e., Poland, the Czech Republic or Hungary—"are facing any imminent threat").

109. *See generally* ADAM D. ROTFIELD & WALTHER STUTZLE, *GERMANY AND EUROPE IN TRANSITION* 93-230 (Oxford Univ. Press 1991) (quoting various world leaders and treaties). *GERMANY AND EUROPE IN TRANSITION*, written in the immediate post-Cold War period, contains the partial texts of a number of international treaties, including, The Charter of Paris for a New Europe, November 21, 1990, signed by all 34 members of the Conference [now Organization] on Security and Cooperation in Europe, Paris, which declares,

We undertake to build, consolidate and strengthen democracy as the only system of government of our nations. In this endeavour, we will abide by the following: . . .

. . . Democratic government is based on the will of the people, expressed regularly through free and fair election . . .

. . . Economic liberty, social justice and environmental responsibility are indispensable for prosperity . . .

. . . An abiding adherence to shared values and our common heritage are the ties which bind us together. With all the rich diversity of our nations, we are united in our commitment to expand our co-operation in all fields. The challenges confronting us can only be met by common actions, co-operation and solidarity.

*Id.* at 219-21. *But see* Rick Atkinson, *Russian Official Assails NATO Expansion Plans, Warning of Sharper Conflict*, WASH. POST, Feb. 4, 1996, at A30 (conveying the views of Andrei A. Kokoschin, Russian Deputy Defense Minister, who warned that continued NATO expansion eastward into the former nations of the Eastern Bloc

The world community's responses to Iraq's aggression and the Balkan chaos provide proof of a "new world order".<sup>110</sup> In Iraq, the months leading up to the start of Operation Desert Storm<sup>111</sup> witnessed the U.N. Security Council passing twelve resolutions relating to Iraq's invasion and occupation of Kuwait.<sup>112</sup> Critically, Resolution 678,<sup>113</sup> passed by

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"risks 'sharpening the hostility' between former adversaries and could 'fundamentally undermine Russia's confidence in the policy of the West.'"); Liben, *supra* note 102, at A14 (noting that both pro-communist parties and "rightist imperialism" are growth industries in present-day Russia, leading Liben to observe that the Iron Curtain "has been torn, but rumor has it that Moscow's sewing machines are beginning the process of trying to stitch it together again.").

110. See *infra* note 112 (discussing U.N. Security Council resolutions against Iraq) and notes 130-40 and accompanying text (describing the world's reaction to the crisis in Bosnia).

111. See generally ATKINSON, *supra* note 30 (writing in great detail about allied air, sea and ground operations in Desert Storm).

112. See George S. Swan, *Presidential Undeclared Warmaking and Functionalist Theory*, 22 CAL. W. INT'L L.J. 75, 84-86 (1991-92) (discussing Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, 677 and 678). See also S.C. Res. 660, U.N. SCOR, 45th Sess., 2932 mtg., U.N. Doc. S/RES/660 (1990) (condemning, *inter alia*, the Iraqi invasion of Kuwait and calling upon Iraq to withdraw "immediately and unconditionally" to pre-August 1, 1990 positions); S.C. Res. 661, U.N. SCOR, 45th Sess., 2933 mtg., U.N. Doc. S/RES/661 (1990) (re-affirming, *inter alia*, Resolution 660 and imposing extensive trade embargoes on Iraq and occupied Kuwait in addition to calling on member states "[n]ot to recognize any regime set up by the occupying power."); S.C. Res. 662, U.N. SCOR, 45th Sess., 2934 mtg., U.N. Doc. S/RES/662 (1990) (declaring, *inter alia*, the Security Council's grave alarm "by the declaration by Iraq of a 'comprehensive and eternal merger' with Kuwait" and reaffirms its determination "to bring the occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait."); S.C. Res. 664, U.N. SCOR, 45th Sess., 2937 mtg., U.N. Doc. S/RES/664 (1990) (demanding, *inter alia*, Iraq's compliance with international law regarding the "safety and well being of third state nationals in Iraq and Kuwait"); S.C. Res. 665, U.N. SCOR, 45th Sess., 2938 mtg., U.N. Doc. S/RES/665 (1990) (calling, *inter alia*, upon member states "to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council" to enforce the embargo declared in Resolution 661); S.C. Res. 666, U.N. SCOR, 45th Sess., 2939 mtg., U.N. Doc. S/RES/666 (1990) (directing U.N. and other appropriate agencies to determine whether foodstuffs and similar provisions can be exempted from embargo under Resolution 661 and, if so, that such foodstuffs and similar provisions be made available to Iraq and Kuwait "in order to relieve human suffering"); S.C. Res. 667, U.N. SCOR, 45th Sess., 2940 mtg., U.N. Doc. S/RES/667 (1990) (demanding, *inter alia*, that Iraq comply with treaties, to which it is a party, regarding the treatment of diplomatic missions and their personnel, and comply with international law in the treatment of foreign nationals); S.C. Res. 669, U.N. SCOR, 45th Sess., 2942 mtg., U.N. Doc. S/RES/669 (1990) (reasserting the Security Council's interest in seeing that requests

the Security Council on November 29, 1990, authorized member nations to "use all necessary means" to evict Iraq from Kuwait.<sup>114</sup> As a permanent<sup>115</sup> member of the Security Council, Russia had the opportunity to utilize its veto power to protect Iraq, one of its largest clients. Instead, Russia voted in favor of every Security Council resolution, further cementing its burgeoning relationship with the west.<sup>116</sup> Cooperation between the east and the west, unthinkable less than a decade earlier, became reality less than one year after the fall of the Berlin Wall.

Granted, the extent of change in international relations is far from a settled premise. The question of whether international relations truly experienced a fundamental shift is the subject of much academic and official debate.<sup>117</sup> In response to the current flux in international rela-

by states made pursuant to Article 50 of the U.N. Charter are addressed in a timely manner by the committee established under Resolution 661 of August 6, 1990); S.C. Res. 670, U.N. SCOR, 45th Sess., 2943 mtg., U.N. Doc. S/RES/670 (1990) (reaffirming all previous Security Council resolutions through "maximum use of political and diplomatic means."); S.C. Res. 674, U.N. SCOR, 45th Sess., 2951 mtg., U.N. Doc. S/RES/674 (1990) (reminding Iraq, *inter alia*, of its responsibilities under various human and diplomatic rights accords to which it is a party); S.C. Res. 677, U.N. SCOR, 45th Sess., 2962 mtg., U.N. Doc. S/RES/677 (1990) (demanding that Iraq cease its efforts to "alter the demographic population of Kuwait."); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963 mtg., U.N. Doc. S/RES/678 (1990) (acting pursuant to its authority under Chapter VII of the U.N. Charter, the Security Council called upon member states "to use all necessary means to uphold and implement Resolution 660 . . . and all subsequent resolutions and to restore international peace and security in the area . . .").

113. S.C. Res. 678, U.N. SCOR, 45th Sess., 2963 mtg., U.N. Doc. S/RES/678 (1990).

114. *Id.*

115. The five permanent members of the Security Council are China, France, Great Britain, Russia and the United States. U.N. CHARTER art. 23. Each permanent member, through the exercise of their veto, has the power to kill any provision emanating from the Security Council. U.N. CHARTER art. 27.

116. See Brzezinski, *supra* note 108, at 40 n.3 (citing Dmitri Trenin, *Will NATO Expand Eastward - and What Should Russia's Policy Be in this Regard*, NOVOYE VREMYA, No. 43, October 1994). Trenin writes:

Russia must learn that our country's true objective lies not in suppressing NATO membership for Central Europe, but rather in the stable demilitarization of our relations with the West . . . . Consequently, there is no use spending all our energy opposing NATO expansion. Instead of this, we should chart a course toward convergence and close interaction between NATO and the Russian Federation.

117. See generally OLD NATIONS, NEW WORLD: CONCEPTION OF WORLD ORDER (David Jacobson ed., 1994) (discussing the perspectives of various nations in the

tions, Professor Jack Snyder<sup>118</sup> developed a paradigm known as neo-liberal institutionalism: "[The neo-liberal institutional] approach assumes . . . an institutional structure that provides legitimate and effective channels for reconciling conflicting interests. [Neo-liberalism sees] political order as arising from organized procedures for articulating interests and settling conflicts among them."<sup>119</sup>

In short, Snyder does not view multilateralism as a result of pure economic interdependence. Rather, the current era stems from the internationalization of institutions in all areas of importance, whether military, economic, or political. Institutions such as the U.N., the General Agreement on Trade and Tariffs,<sup>120</sup> the European Union,<sup>121</sup> the North Atlantic Treaty Organization,<sup>122</sup> and the Organization for Security and Cooperation in Europe,<sup>123</sup> have all contributed to the institutionalization

changing international order); WHOSE WORLD ORDER? (Hans-Henrik Holm & Georg Sørensen eds., 1995) (differing perspectives on the new world order); CHARLES STEWART GOODWIN, THE THIRD WORLD CENTURY (1994) (arguing the post-Cold War legacy will include the emergence of the Third World in international events, to the detriment of the Cold War's victors).

118. Snyder, *supra* note 12, at 5-41.

119. *Id.* at 15.

120. See generally THE BRETTON WOODS—GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS (Orin Kirshner, ed., 1996) (providing a highly informative and authoritative text on international economic institutions). This work contains a conglomeration of views from over thirty "founders and early leaders" of various international economic institutions, "their adaptations over the last five decades, and their capacity to respond to current and future planetary challenges." *Id.* at vii.

121. See DR. KLAUS-DIETER BORCHARDT, EUROPEAN INTEGRATION (4th ed. 1995) (articulating a short, yet thorough, introduction to the past and present of the European Union). See also R.C. MOWAT, CREATING THE EUROPEAN COMMUNITY (1973) (providing a more extensive and thorough—yet older—examination of the history of the European Union).

122. For a history of NATO, see DON COOK, FORGING THE ALLIANCE (1989). For an extensive look at NATO'S prospects in the post-Cold War era, see CHERNOFF, *supra* note 26.

123. The Organization on Security and Cooperation in Europe was formerly known as the Conference on Security and Cooperation in Europe. Its role and importance in world affairs can be found in Vladimir Shustov, *The Present and Future Development of the Situation in Europe and the Role of the CSCE*, in THE INTERNATIONAL SYSTEM AFTER THE COLLAPSE OF THE EAST-WEST ORDER 749-69 (Armand Clesse et al. eds., 1994).

A more critical examination of the CSCE can be found in Victor-Yves Ghebali, *The CSCE Process: Bright Past, Fuzzy Present, Uncertain Future*, in THE INTERNATIONAL SYSTEM AFTER THE COLLAPSE OF THE EAST-WEST ORDER 770-80 (Armand Clesse et al. eds., 1994).

of international relations. Snyder notes, "[t]he institutionalized, legal character of the relationship would make for predictability, irreversibility, and deeply penetrating effects on the domestic orders of the state."<sup>124</sup>

The world continues to move away from the bifurcated struggle between capitalism and communism. As nations grow closer with greater and more penetrating economic, political and military ties multilateral institutions, such as the U.N., should play an even greater role in cementing those ties and fostering new ones.

#### B. THE NECESSARY ENGAGEMENT OF THE UNITED STATES: BOSNIA

Post-Cold War peace is an illusory goal without the participation and cooperation of the United States.<sup>125</sup> The enduring war in the former Yugoslavia demonstrates the resulting consequences when there is a lack of United States leadership.

The war in the Balkans is over five years old.<sup>126</sup> Hundreds of thousands of people are dead,<sup>127</sup> and millions are displaced or transformed into refugees.<sup>128</sup> Stories of ethnic cleansing and wanton brutality are

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For a discussion on the changing role of the CSCE (and OSCE) in post-Cold War Europe, see Dr. TH.J.W. Sneek, *The CSCE in the New Europe: From Peace to Regional Arrangement*, 5 IND. INT'L & COMP. L. REV. 1, 72 (1994) (arguing that CSCE is an unsuccessful organization, lacking legal authority under Article 52 of the U.N. Charter to effect change as a regional arrangement).

124. *Id.* at 33.

125. Former Secretary of State James A. Baker, III, testifying before Congress, noted,

Empires rise and fall. Great powers come and go. But the United States has, uniquely, been something very different: a leader. And the world is a freer and more stable place for it. Today, despite the end of the Cold War, American leadership remains imperative. Your task in the 104th Congress and, indeed, our task as a people, is to understand this reality and to act on it.

James A. Baker, III, *The Administration's Foreign Policy*, Jan. 12, 1995, 1995 WL 10400 (F.D.C.H.), at 17 [hereinafter "Baker Testimony"].

126. See John Pomfret, *Balkans Must Confront a History of Hatred*, WASH. POST, Dec. 17, 1995, at A1 (describing the post-World War II history of the former Yugoslavia, concentrating mostly on the civil war that erupted in 1991). As an example of the pure hatred the warring factions felt for each other, Pomfret relates the story of two brothers, Pajo and Drago Vuckovic. Pajo joined the Serbian side while Drago joined the Croatian side of the conflict. On August 15, 1991, "Drago . . . was manning a sniper's nest . . . when Croatian gunfire cut his brother down." *Id.* "'I thought, 'Let the bastard die,' Vuckovic recalled. He had abandoned Croatia. He was fighting for the Serbs. I just walked away.'" *Id.*

127. *Id.*

128. See *The Former Yugoslavia's Diaspora*, WASH. POST, Dec. 8, 1995, at A45



commonplace.<sup>129</sup> Yet, for five years, the world largely watched the slaughter from the sidelines. Some European nations contributed troops to protect the so-called safe havens in a handful of Bosnian cities.<sup>130</sup> The fall of Srebrenica and Zepa, two of the U.N. designated safe havens, in the summer of 1995, evidenced the fallacy of the world's ability to protect such zones.<sup>131</sup>

In the months leading up to the peace talks in Dayton, Ohio, Europe came face-to-face with its inability to stop the Balkan fighting.<sup>132</sup> A consensus emerged that only the United States possessed the diplomatic and military muscle to effect a peace in the Balkans.<sup>133</sup>

Americans, too, viewed themselves as the primary arbiters of world diplomacy.<sup>134</sup> In fact, American Admiral Leighton W. Smith, com-

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(tallying over 650,000 refugees who went to western nations, including the United States, Germany, and Sweden).

129. See John Pomfret, *Atrocities Leave Thirst for Vengeance in Balkans*, WASH. POST, Dec. 18, 1995, at A1 (describing in vivid detail the rape, pillage and torture in which the Serbs, Croats and Muslims engaged during the war). The article also includes a list of the 56 men indicted by the U.N. War Crimes Tribunal, for crimes ranging from "[p]ush[ing] four prisoners out of a forced march, put[ting] them against a wall and [shooting] them to death," to "[r]emov[ing] 261 men from hospital to a remote field and ha[ving] them shot to death," to "rap[ing] a prisoner." *Id.* See also Michael Dobbs & R. Jeffrey Smith, *New Proof Offered of Serb Atrocities*, WASH. POST, Oct. 29, 1995, at A1 (describing a "rare" release of information from an ongoing intelligence operation that disclosed discovery of possible mass grave sites constructed by Serbs thought to contain remains of thousands of Muslim men and boys). The article describes numerous massacres of Muslims, of which United States reconnaissance satellites captured the preparations, following the 1995 fall of Srebrenica, a Muslim enclave located in northern Bosnia. *Id.*

130. See generally PETER MAASS, *LOVE THY NEIGHBOR* (1996) (discussing the commitment of troops by France and Great Britain during the Bosnian War).

131. Kevin Fedarko, *Louder than Words*, TIME, Sept. 11, 1995, at 50.

132. A senior European diplomat said: "Europe's biggest difficulty was disagreement among France, Germany and Britain over whether and how to intervene and stop the war. There never really was a common policy, and even if they came close it never could have succeeded unless they got American military support to back it up." William Drozdiak, *Europe Rues U.S. Success in Peace Pact*, WASH. POST, Nov. 23, 1995, at A32.

133. Charles Lambroschini, a European reporter, notes, "[s]ince the fall of the Berlin Wall, the Old Continent remains cuddled up under the American umbrella. Unfortunately, as long as the 15 [European Union] states do not have the will to form their common security, Washington alone will decide." *Id.*

134. A United States Department of State official comments, "[t]he fall of Srebrenica was a blow to the credibility of the West, and [the United States is] the leader of the West. If we didn't respond with United States leadership, the situation

mander of NATO's southern flank, was the catalyst for the airstrikes launched against Serb positions following a deadly mortar attack on a Sarajevo marketplace.<sup>135</sup> As a direct result of the bombing campaign, "word filtered out of Pale via Belgrade on August 31, that perhaps, just perhaps, it might be time to talk."<sup>136</sup> The end result, it seems, is the Dayton Peace Agreement.<sup>137</sup> Even the Bosnian protagonists—Milosevic, Izebegovic and Tudjman—looked to the United States for leadership.<sup>138</sup>

The impact of the leadership of the United States manifested itself on December 20, 1995, when the U.N. formally handed over its role in Bosnia to NATO.<sup>139</sup> The deployment of NATO's Implementation Force is not without its share of operational snags, political uncertainty and casualties.<sup>140</sup> Bosnia, however, is free from random, wanton bloodshed for the first time in five years.<sup>141</sup>

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was going to unravel." Fedarko, *supra* note 131, at 51.

135. Rick Atkinson, *Air Assault Set Stage for Broader Role*, WASH. POST, Nov. 15, 1995, at A1. Atkinson describes the events leading up to, and the execution of, Operation Deliberate Force, NATO's protracted air and artillery campaign against the Bosnian Serbs. *Id.* The plan, code-named Dead Eye, was designed to destroy Bosnian Serb air defenses throughout the region, thereby opening lanes for later attack aircraft to hit ammunition dumps, command centers and communications facilities. *Id.*

136. *Id.*

137. See generally William Drozdiak, *Leaders Signs Pact to End War; Clinton Urges People of Battered Country to "Seize This Chance,"* WASH. POST, Dec. 15, 1995, at A1 (describing in detail the formal signing ceremony of the Dayton Peace Accord at the Elysee Palace in Paris, France). See also President's Letter to Congress on Bosnia-Herzegovina, 31 WEEKLY COMP. PRES. DOC. 2215 (Dec. 22, 1995) (reporting to Congress that the Dayton Peace Accords were signed on December 14, 1995).

138. Michael Dobbs, *In War and Peace Talks, Bosnian Conflict is About Land*, WASH. POST, Nov. 12, 1995, at A28.

139. Pomfret, *supra* note 1, at A35. See S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607 mtg., U.N. Doc. S/RES/1031 (1995) (documenting the Security Council handing over responsibility for the crisis in Bosnia to "a multinational implementation force.").

140. See Stacy Sullivan, *Serb Forces Cut Contacts with NATO*, WASH. POST, Feb. 9, 1996, at A23 (reporting that the decision of Bosnian Serb military commander General Ratko Mladic to "suspend contacts with NATO" in retaliation for the detention of eight Serbian soldiers and officers for war crimes has "plunged the Dayton peace process into sudden and unexpected trouble."). See also Rick Atkinson, *Call it Camp Swampy*, WASH. POST, Jan. 1, 1996, at A16 (describing the various environmental challenges United States troops are facing during the deployment, especially the mud, which "... saps your soul, it sucks at your will to live.").

141. Evidence of this is found in recent newspaper articles on Bosnia. Instead of reporting on rape and pillage, recent articles reported on the upcoming elections. See Johnathan Randal, *Deadlines Set for Bosnian Goals*, WASH. POST, Aug. 15, 1996, at A30 (reporting on the elections in Bosnia).

C. NECESSARY ENGAGEMENT VERSUS POLITICAL REALITY: CONGRESS,  
THE PRESIDENT, AND THE DEBATE OVER BOSNIA

A plausible argument exists for continued United States engagement overseas.<sup>142</sup> The extent of that engagement, however, remains ill-defined, as demonstrated in the debate surrounding the deployment of United States forces to Bosnia. On one side, the President presented a two-pronged argument as the basis of his authority to deploy the troops. First, the President claimed he had the authority under the Constitution to deploy troops overseas without congressional authorization.<sup>143</sup> Sec-

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142. See *supra* Section III.A-B (discussing the New World Order and the crisis in Bosnia). See also *Bring Back the Seventh Fleet*, WALL ST. J., Jan. 31, 1996 (observing that the decreased presence of the United States Navy in South East Asia has created a power vacuum in which China has begun to assert itself by "building military outposts on . . . reefs [over which China has a dispute with Taiwan] in the South China Sea, unseen by United States satellites that were no longer watching."). In addition, the Editorial notes that the recent deployment of United States Navy carrier battle group was enough to "restore the equilibrium that kept Asia relatively quiet as recently as two years ago." *Id.* See also Jim Hoagland, *China: Before There is a War*, WASH. POST, Feb. 11, 1996, at C7 (calling upon the Clinton administration to abandon its current policy of "comprehensive engagement" in favor of "selective disengagement," which, theoretically, would demonstrate to the Chinese that its relationship with the United States is no longer viewed as essential to the future of the United States and can be abandoned entirely if China continues its destabilizing actions in the region, especially in relation to Taiwan); Joyce Barnathan, *Rethinking China*, BUS. WK., March 4, 1996, at 57 (reporting the large influx of Russian weapons into China, including advanced Su-27 fighter planes).

United States Secretary of Defense, William J. Perry, notes that American policy is to accept China at its word that the Asian state wants to become a world power. *Id.* He adds, however, "[that] China sends quite the opposite message when it conducts missile tests and large military maneuvers off Taiwan when it exports nuclear weapons technology or abuses human rights." *Id.*

In a related article, Amy Borrus comments that "[i]f Clinton is unable to manage relations with China, there is a danger that the world's most popular nation and the U.S. could wind up in a kind of 21st-century cold war." Amy Borrus, *Crafting a Realistic China Policy*, BUS. WK., March 4, 1996, at 65.

143. A diverse assembly of administration officials offered the President's position on numerous occasions. Secretary of State Warren Christopher, Secretary of Defense William Perry, and Chairman of the Joint Chiefs of Staff John Shalikashvili engaged in the following debate with Senator Charles Robb (D-VA) in hearings before the Senate Foreign Relations Committee:

*Senator ROBB:* If a resolution [by Congress] were to be offered . . . to the effect that any movement of U.S. forces into Bosnia-Herzegovina without the express prior approval of Congress would be prohibited, what would your reaction be to such a resolution?

ond, the President relied primarily on moral indignation to challenge the Congress to support the mission.<sup>144</sup>

On the other side, most of Congress vociferously denied the President that authority, relying instead on its constitutional prerogatives.<sup>145</sup> The President, it could be argued, won the debate as the lead elements of the First Armored Division rolled into Bosnia without express congressional authorization.

The path toward the constitutional debate over Bosnia began in 1992 when Clinton committed the United States to sending over twenty thousand ground troops as part of an international peace implementation force.<sup>146</sup> Senator Nunn observed that the President failed to consult

*Secretary CHRISTOPHER*: . . . I would say that, from a fundamental standpoint, that the President would have to say that he is not bound by such a resolution . . . .

As you know, right up to the last, he said that if there was a resolution he would welcome it. *But if there was a resolution he would not feel bound by it.* *Hearings on the Peace Process in the Former Yugoslavia Before the Senate Comm. on Foreign Relations*, 104th Cong., 1st Sess., 31 (1995) (emphasis added) [hereinafter "Senate Hearings"].

144. Secretary of State Warren Christopher noted,

If we want to stop the killing, if we want to end the worst conflict that's taken place in Europe since World War II, then we must follow through on the strategy [manifest by intense NATO airstrikes undertaken in response to the shelling of Sarajevo marketplace].

Let me say again, that I believe we have the best chance in four years to achieve peace in the former Yugoslavia. *Future generations will neither forgive nor understand if we turn our backs on this unusual opportunity for peace.*

America simply must continue to lead.

Deployment Hearings, *supra* note 10, at 9 (emphasis added).

The President defined America's interests as preventing the war from spreading to other parts of Europe and building a Europe at peace. William J. Clinton, *Why Bosnia Matters to America*, NEWSWEEK, Nov. 13, 1995, at 55. The President closed his remarks noting, "[n]ow is the time for the United States to stand by our principles and stand up for our interests. We must be leaders for peace. That is our responsibility as Americans." *Id.*

145. See Senate Hearings, *supra* note 143, at 95 (statement of Chairman Helms (R-N.C.)) (admonishing the witnesses who had testified before the Senate Comm. on Foreign Relations by stating: "[y]ou've done well . . . but let me suggest with all sincerity I possess that you not proceed with putting American military personnel on the ground in harm's way without congressional approval. I make that suggestion to you in good faith and I hope that you will be attentive to it").

146. See Barton Gellman & Ann Devroy, *U.S. May Offer Troops for Bosnia*, WASH. POST, Feb. 10, 1993, at A1 (reporting that "[i]n a major U.S. policy shift . . . President Clinton's highest-ranking national security advisers reached consen-

with anyone from the Congress in arriving at this decision.<sup>147</sup>

Nearly three years later, the warring factions of the Bosnian conflict emerged from the conference rooms at Dayton with a blueprint for peace.<sup>148</sup> The plan called for an international force of over sixty thousand troops, twenty thousand of which were to be American based on President Clinton's 1992 commitment.<sup>149</sup> Congress, however, disagreed with President Clinton on the need to deploy United States ground troops.<sup>150</sup> Congress debated impassionately and eloquently over the troop deployment.<sup>151</sup> Most congressional outsiders, however, viewed the debate as simply politics as usual.<sup>152</sup> Ultimately, Congress folded its hand and passed milquetoast measures supporting the troops but disagreeing with the deployment.<sup>153</sup>

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sus . . . that [the offer to send 20,000 troops] was the 'price of admission' if the United States wished to force further negotiations among Bosnia's warring groups on a peace accord.").

147. 141 CONG. REC. S18,679, *supra* note 6, at S18,681 (statement of Senator Nunn). *See Id.* (statement of Senator Warner) (agreeing with Senator Nunn, "that in February 1993, when President Clinton made this specific commitment [to commit troops to the Bosnia operation], I did not have any knowledge nor did other members, senior members, of the Armed Services Committee, to my knowledge.").

148. *See* Drozdak, *supra* note 137 (discussing the Dayton Peace Accords).

149. *See* Gellman & Devroy, *supra* note 146, at A1 (describing the Clinton Administration's original commitment to deploying troops to Bosnia).

150. *See* Helen Dewar & Guy Gugliotta, *Senate Backs Troops to Bosnia; House Retreats on Funds Cut-off*, WASH. POST, Dec. 14, 1995, at A1 (reporting the contradictory message both houses of Congress sent the President regarding the Bosnian deployment). The Senate vote was 69 to 30 in favor of the deployment "and 52 to 47 against a resolution opposing Clinton's decision to dispatch the troops. The House approved the resolution opposing the President's policy but supporting the troops by a vote of 287 to 141 . . . [and] then rejected, 237 to 190, a democratic resolution that supported troops without reference to policy." *Id.*

The President signed the Dayton Peace Accords (calling for the inclusion of American forces in the peacekeeping operation) although the Accords had only a "lukewarm resolution of support" from the Senate and received "an expression of opposition" from the House. *Id.*

151. 141 CONG. REC. S18,679, *supra* note 6, at S18,681.

152. The Washington Post opined:

[Some members of Congress] wanted to have it both ways: to avoid responsibility for a bad outcome in Bosnia but to share in the political fruits of a good outcome . . . they said the mission was not worth fighting for, and then they offhandedly accepted that American soldiers should be sent to fight for it. *How flabby.*

*Congress and Bosnia*, WASH. POST, Dec. 15, 1995, at A24 (emphasis added).

153. *See* Dewar & Gugliotta, *supra* note 150, at A1 (describing the votes cast on

These measures were not the first attempts by Congress to scuttle American participation in the peace process. On two previous occasions, the House of Representatives voted to severely restrict any United States involvement in the implementation force planned for deployment to Bosnia pursuant to a peace treaty.<sup>154</sup> The measures passed despite previous commitments made by President Clinton.<sup>155</sup> Further, and perhaps more importantly for this Comment, these resolutions passed during the negotiations in Dayton.

The point is that instead of presenting a united front upon which negotiating foreign parties, or treaty-based allies, could rely, the United States government articulated two completely opposing policies. Adoption of this Comment's recommendations<sup>156</sup> would eliminate such confusing and dichotomous foreign policy pronouncements. The alternative, as demonstrated in Bosnia, is to scuttle opportunities for peace,<sup>157</sup> both

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the measures passed by Congress regarding the deployment to Bosnia).

154. *Id.*

155. Gellman & Devroy, *supra* note 146, at A1.

156. See *infra* Section V (recommending the adoption of the three amendments put forth by the author).

157. The argument for involvement in the Bosnian conflict is compelling, even if one only examines the moral reasons for intervention. Peter Maass, a reporter for the Washington Post, describes a devastating journey through the horrific reality of Serbian prison camps. MAASS, *supra* note 130. Time and again, the reader is confronted with what public officials knew for years: Serbian warlords waged a campaign of unspeakable terror on the Muslim population of Bosnia. *Id.* The snippets of cruelty reported by the western press were but small parts of much larger mosaic of systematic evil inflicted primarily on a civilian population. *Id.*

Maass relates many anecdotes about atrocities committed by the Serbs. In one account, the Muslim town of Kozarac was shelled heavily by Serb artillery for a number of hours. *Id.* at 38. When the shelling stopped, "the Serbs used loud speakers to tell [the townspeople] that they would not be harmed if they left their basements and surrendered. The people complied, and almost as soon as the streets filled up with surrendering Muslims, the shelling resumed . . . [T]he street became littered with severed limbs and human gore." *Id.* at 38-9. Maass estimates that the entire attack on Kozarac killed "at least 2,500 civilians." *Id.* at 39.

Maass also recounts an episode in which one prisoner, Emin Jakubovic, was ordered by guards "to castrate three prisoners" with his teeth. *Id.* at 50.

Maass also quotes from a U.N. Security Council report, "Abuse of Civilians in Detention Centers," dated October 22, 1992, and documenting that:

The witness stated that a young Muslim man from Kozarac who had owned a Suzuki motorcycle was tortured in front of the other prisoners. He was severely beaten all over his body and his teeth were knocked out. The guards then tied one end of a wire tightly around his testicles and tied the other end to the victim's motorcycle. A guard got on the motorcycle and sped off.

at home and abroad.

In the end, however, Congress relented. On December 20, 1995—after five years of the bloodiest combat seen in Europe since the end of the Second World War—British General Rupert Smith,<sup>158</sup> commander of the U.N. mission in Bosnia, made way for American Admiral Leighton Smith,<sup>159</sup> commander of Operation Joint Endeavor.<sup>160</sup> With that transfer, the Dayton Peace Accords became a reality.

#### IV. REVISITING THE REVOLUTION

##### A. SETTING THE STAGE

From the conference rooms of Dayton to the shores of Kuwait, the leadership of the United States is the necessary ingredient when the U.N. faces large-scale crises.<sup>161</sup> Critics of the overseas involvement of the United States cannot evade the reality that without the leadership of the United States, Iraq would still occupy Kuwait and Sarajevo would still receive artillery barrages. Whether the United States *should* involve itself is, of course, a different question entirely. To this end, the above

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*Id.*

It is difficult to imagine, with a peace accord nearly at hand, why a representative or senator would think that politics should overshadow humanity.

For a history of the Balkans and associated tribal hatreds, see MIRON REZUN, *EUROPE AND WAR IN THE BALKANS* (1995) which provides a complete history of the Balkans conflicts beginning with the first century.

158. John Pomfret, *Serbs Bid U.N. Commander a Brusque Farewell*, WASH. POST, Dec. 21, 1995, at A36.

159. Pomfret, *supra* note 1, at A35.

160. *Id.* Operation Joint Endeavor is the code-name for the deployment of troops to Bosnia. There are 15 NATO countries involved in the operation. In addition to the NATO forces, the participation of troops from Russia, Finland, Sweden, Poland, Austria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, New Zealand, Pakistan, Romania, Slovakia and Ukraine has been promised.

The Dayton Peace Accords divide Bosnia into three sectors, each patrolled primarily by American (Northeast), British (Northwest) and French troops (South). There are pockets of all three warring factions in each of the three sectors. The Accords aim to separate and reform these factions along stipulated boundary lines.

161. See Baker Testimony, *supra* note 125, at 17 (quoting the former Secretary of State James A. Baker, III, as stating that the United States, because of its position as the last remaining superpower, must continue to exercise leadership in the international arena in the post-Cold War era).

section, discussing neo-liberal institutionalism, demonstrates that international relations are conceivably on a path toward peace.<sup>162</sup> This path is lit with the potential of multilateral solutions to international crises. Yet without United States leadership, the path is much less certain to head in the right direction or end at the proper destination. In order to secure a more favorable chance for overseas involvement of the United States, this Comment's amendment suggestions should be adopted.<sup>163</sup> The amendments allow the President to deploy troops pursuant to a U.N. Security Council resolution.

## B. THE FAILURE OF THE WAR POWERS RESOLUTION

The Resolution is a failed attempt to assuage the post-Vietnam shame and grief that followed the nation's Indochina experience.<sup>164</sup> Even "[o]ne of the most outspoken advocates of legislative war powers,"<sup>165</sup> Senator Thomas Eagleton, lectured the Foreign Relations Committee on what he considered to be Congress's lack of fortitude to take on the delicate and politically dangerous role of standing against a president on a foreign policy initiative.<sup>166</sup> Some political analysts argue that the

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162. See *supra* notes 102-59 and accompanying text (discussing the post-Cold War international environment and the role of the United States in such an environment).

163. See *supra* Section V (setting forth the author's recommendations).

164. See ROBERT F. TURNER, *THE WAR POWERS RESOLUTION* xii, 2-10 (1983) (arguing, *inter alia*, that the Resolution was a direct result of Congress' new found power over the executive branch due to the nation's anguish over the Vietnam War).

165. *Id.* at 160.

166. Prepared statement of Senator Thomas Eagleton, United States Congress, Senate Committee on Foreign Relations, *The War Powers After 200 Years*, at 366. The Senator is quite harsh in his criticism of the Committee of which he was formerly a member:

[I] came to the conclusion that Congress really didn't want to be in on the decision-making process as to when, how, and where we go to war. I came to the conclusion that Congress really didn't want to have its fingerprints on sensitive matters pertaining to putting our Armed Forces into hostilities. *I came to the conclusion that Congress preferred the right of retrospective criticism to the right of anticipatory, participatory judgment . . . .*

If the [1987-88 reflagging of Kuwaiti oil tankers] blows up, Senators and Representatives will be free to point out how things went wrong—how erroneous policies were executed of which they were not a part. If there had been a congressional vote authorizing [the reflagging mission] with some congressional limitations, then congressional fingerprints would be on the job and failure would be a shared result.

*I harbor the notion that most Senators and House Members don't have the*



public's perception of the success or failure of a troop deployment is the determinative factor in whether Congress will voice its opposition or assent.<sup>167</sup> Other commentators argue that "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility."<sup>168</sup>

## V. RECOMMENDATIONS

The Resolution is essentially dead law. In the twenty-three years since its inception, Congress invoked the Resolution only once.<sup>169</sup> In the

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*political stomach for decision-making involving war.*

*Id.* (emphasis added).

167. See TURNER, *supra* note 51, at 159 (noting that "Presidential initiatives that are perceived by the public as being successes are routinely praised—irrespective of clear violations of the war powers statute—while otherwise similar operations that fail are denounced as executive branch lawbreaking.").

168. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, Robert H., concurring).

169. Since 1973, there have been numerous hostile overseas deployments of United States troops, including the 1980 rescue attempt in Iran, the 1982-83 peacekeeping mission to Lebanon, the 1983 invasion of Grenada, the 1987-88 reflagging mission in the Persian Gulf, the 1989 invasion of Panama, the 1990-91 Persian Gulf War, and, most recently, the deployment of ground troops to Bosnia. No President has ever filed a War Powers Report "pursuant" to the Resolution. See generally Harold H. Koh, *War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1 (1995) (providing an overview of the historic war powers relationship between the executive and legislative branches).

A typical evasion employed by the executive branch is to avoid acknowledging that hostilities either exist or are imminent. A common example can be found in the 1987-88 reflagging of Kuwaiti oil tankers in the Persian Gulf. By the spring of 1988, the United States military had established a substantial presence in the Persian Gulf region. Pat Towell, *New Gulf Incident Rekindles an Old Debate*, CONG. Q., Apr. 23, 1988, at 1051. Any question about hostilities, actual or imminent, were quickly put to rest by various, publicly reported confrontations between Iranian and United States forces. *Id.*

On April 14, the United States Navy frigate *Samuel B. Roberts* hit a mine off Qatar, injuring 10 crewmen. *Id.* Three days later, United States forces struck back at Iran, the alleged culprit, razing two oil drilling platforms with naval gunfire and commando raids. *Id.* at 1058. Other incidents that day included the United States Navy cruiser *Wainwright* firing surface-to-air missiles at Iranian F-4 Phantom jets, retaliatory missile and bomb strikes against an Iranian missile boat, retaliatory strikes against Iranian gunboats for firing on oil platforms belonging to the United Arab Emirates, and the retaliatory attack on two Iranian frigates accused of firing on United States warships. *Id.* at 1057-58.

post-Cold War world, when faced with situations as demanding yet divergent as the Gulf War and Bosnia, the limits of United States involvement overseas remain undefined and inconsistent.<sup>170</sup>

Though the Resolution is a failure, Congress has neither repealed nor altered it since 1973. There are, however, two schools of thought regarding proposed changes to the Resolution. In one camp Professor John Hart Ely suggests retaining the Resolution's original framework and much of its language but eliminating the more troublesome aspects of Resolution.<sup>171</sup> In the second camp, Senator Joseph Biden advocates a complete restructuring of the Resolution.<sup>172</sup> As this Comment confines itself to the internal inconsistencies of section 1547 of the Resolution, analysis of the suggestions put forth by Professor Ely and Senator Biden will also be so limited.

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Perhaps the most candid admission that United States forces were engaged in combat with Iranian forces came from then-Secretary of Defense Frank Carlucci, who, when asked if the United States was at war, responded,

[o]h, yes, I don't think there's any question that--well, war--you get into semantic issues here. The military would call it more an engagement, or a fire-fight . . . . *We were having problems with the War Powers Act [sic], so I hesitate to use the term war*, but there's no question it was a conflict.

*Nightline: The U.S.S. Vincennes: Public War, Secret War* (ABC television broadcast, July 1, 1992) available in LEXIS, News Library, Transcript File. (emphasis added).

The 1975 *Mayaguez* rescue is the solitary example of executive compliance with the Resolution. See President's Letter to the Speaker of the House and the President Pro Tempore of the Senate in Accordance With Section 4(a)(1) of the War Powers Resolution, 11 WEEKLY COMP. PRES. DOC. 514 (May 15, 1975) (noting President Gerald Ford's submission of notification to Congress of military action "in accordance" with the Resolution).

170. The dangers of inconsistency are articulated by Lloyd N. Cutler, former counsel to President Clinton:

Congress needs to recognize that we cannot have 535 commanders-in-chief in addition to the President and that some deference to presidential judgments on force deployments is in order. That is especially true when, as in Korea, Iraq and Bosnia, the President's proposed deployments are based on United Nations Security Council resolutions that we have sponsored and on joint decisions with our allies pursuant to treaties Congress has previously approved.

Lloyd N. Cutler, *Our Piece of the Peace; Sending Troops to Bosnia: Our Duty, Clinton's Call*, WASH. POST, Nov. 26, 1995, at C1.

171. ELY, *supra* note 6, at 115-38.

172. Biden & Ritch, *supra* note 50, at 396-410.

## A. PROFESSOR JOHN HART ELY

Professor Ely acknowledges that sections 1547(a)(2) and (d)(1) are "potentially inconsistent."<sup>173</sup> His solution is to eliminate section 1547(d)(1) and retain 1547(a)(2) as it "is more in line with the prevailing purpose of the Resolution."<sup>174</sup> With all due respect to Professor Ely, his solution is flawed.

The argument to retain section 1547(a)(2) fails on two counts. First, the language "from any treaty heretofore or hereafter ratified"<sup>175</sup> promotes instability among the parties to treaties of which the United States is a signatory. By restricting the president's authority to deploy forces abroad, regardless of treaties "heretofore or hereafter ratified,"<sup>176</sup> Congress eviscerates commitments made by the United States to its treaty-based allies and introduces unnecessary instability into the collective security equation.

Second, section 1547(a)(2) limits the use of United States forces pursuant to treaty obligations unless such use is effected by "legislation specifically authorizing the introduction of United States"<sup>177</sup> forces and "is intended to constitute specific statutory authorization within the meaning of the [Resolution]."<sup>178</sup> This caveat offers little solace to our allies. Far from a grant of power, the caveat is premised on removing the President's authority to deploy forces in response to treaty obligations. The caveat reinforces the new uncertainty section 1547(a)(2) introduced into the treaty equation by placing the decision to respond to treaty-involved crises in the hands of Congress rather than the treaty provisions.

In short, Professor Ely's reliance on section 1547(a)(2) is misguided in an era where the post-Cold War necessity of maintaining effective collective security arrangements is of paramount importance.<sup>179</sup> Further—and, perhaps, more importantly—section 1547(a)(2) does not work. The United States has deployed forces overseas pursuant to treaty obligations since the Resolution's inception without an effective utterance from Congress.<sup>180</sup> Instead of embracing the reality of failure surround-

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173. ELY, *supra* note 6, at 129.

174. *Id.* at 130.

175. The Resolution, *supra* note 3, § 1547(a)(2).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Supra* notes 73-101, 102-161 and accompanying text.

180. See *supra* note 169 (discussing the many incidents in which the United States

ing the Resolution and promise of the "new world order," Professor Ely clings to the failed hope of congressional activism and assertiveness in the War Powers debate. His suggestion for change regarding sections 1547(a)(2) and (d)(1) should not be adopted.

#### B. SENATOR JOSEPH R. BIDEN, JR.

Rather than resuscitate the corpus of a failed law, Senator Biden suggests a complete revision of the Resolution.<sup>181</sup> His war powers balance is premised on the following equation: "The key element of a new framework would be to move beyond the now sterile dispute over precisely what the Constitution, unembellished by legislation, allows and *to accommodate practical reality by enumerating and affirming in law a broad range of soundly conceived presidential authorities.*"<sup>182</sup> [emphasis added].

In short, Senator Biden is prepared to reject the entire Resolution in favor of a more realistic embrace of the presidential/congressional balance of power. Toward this goal, Senator Biden does not directly address section 1547 of the current Resolution,<sup>183</sup> even though he addresses the Resolution's other shortcomings on a section-specific basis. A close examination, however, of the situations in which Senator Biden would allow a President to use force abroad reveals a heavy bias away from the confusion surrounding section 1547.<sup>184</sup> In other words, Sena-

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deployed forces overseas into arguably hostile situations without congressional authorization, and the failure to secure never being the reason for the deployment termination).

181. This Comment does not thoroughly discuss Biden & Ritch's article because Biden advocates completely revising the Resolution, which is beyond the scope of this Comment.

182. Biden & Ritch, *supra* note 50, at 397.

183. One can argue that since Biden advocates a complete revision of the Resolution, specific references to each of the Resolution's existing sections are unnecessary.

184. Biden & Ritch, *supra* note 50, at 398-99. Biden's list authorizes the President to use force abroad:

1. to repel an armed attack upon the United States, its territories, or its armed forces;
2. to respond to a foreign military threat that severely and directly jeopardizes the supreme national interest of the United States under extraordinary emergency conditions that do not permit sufficient time for Congress to consider statutory authorization;
3. to protect and extricate citizens and nationals of the United States located abroad in situations involving a direct and imminent threat to their lives, provided they are being evacuated as rapidly as possible;

tor Biden's examples of situations in which a President may deploy forces abroad without congressional authorization supplants the need for a newly stylized section 1547 because they acknowledge the realistic scenarios in which a President will act, regardless of congressional authorization. For reasons explained below, however, Senator Biden's broad revision is also flawed and should not be adopted.

### C. POST-COLD WAR AMENDMENTS TO THE WAR POWERS RESOLUTION

Though admirable for its acknowledgment of the Resolution's failure, Senator Biden's article cannot—because of its publication date—embrace the emergence of the U.N. in post-Cold War conflicts and crises. Continued and reliable United States involvement in U.N.-sanctioned operations is imperative to cement the gains realized since the fall of the Berlin Wall. In essence, without the political and military support of the United States, the U.N. based post-Cold War peace is untenable.

Senator Biden's suggestion, therefore, falls woefully short of the task facing the "new world order." The world is a different place than when Senator Biden wrote his article. Recently, Russian and American troops conducted joint military exercise on a Kansas prairie.<sup>185</sup> Russian and

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4. to forestall an imminent act of international terrorism known to be directed at citizens or nationals of the United States, or to retaliate against the perpetrators of a specific act of international terrorism directed at such citizens or nationals;

5. to protect, through defensive measures and with maximum emphasis on multilateral action, internationally recognized rights of innocent and free passage in the air and on the seas;

6. to participate in multilateral actions undertaken under urgent circumstances and pursuant to a the approval of the United Nations Security Council; and

7. to participate in multilateral actions undertaken in cooperation with democratic allies under urgent circumstances wherein the use of force could have decisive effect in protecting existing democratic institutions in a particular nation against severe and immediate threat.

185. Biden & Ritch, *supra* note 50, at 398-99. See Scott Canon, *Old Foes Are New Friends: Military Operation Brings Russians to Fort Riley*, KANSAS CITY STAR, Oct. 27, 1995, at A1 (quoting Russian sergeant Yeugeni Ozhogin on the experience of conducting joint operations with American soldiers, as "[t]he more we are together, the more we look alike.").

Partisan politics, however, again reared its head during the joint exercises with Russian troops. *Russian Exercise Cost Questioned*, WASH. POST Oct. 14, 1995, at A15. Freshman Republican Representative Todd Tiahart, a member of the House National Security Committee, "requested details about the costs [of the visit] and asked

American troops work side by side in the hills of Bosnia.<sup>185</sup> Russian and American astronauts recently practiced docking their spacecraft together and intend to construct an international space station.<sup>187</sup> The world, in a very real sense, is a much different place than it was in 1988.

In order to insure continued multilateral travel on the post-Cold War path of peace, the Resolution needs alteration. The Resolution is so interwoven with consultation,<sup>188</sup> reporting,<sup>189</sup> and termination<sup>190</sup> clauses, that a simple change within the legislation's framework will fail to accomplish its original mission. Accordingly, this Comment recommends that Congress amend the Resolution in the following ways.

*Amendment one* shall eliminate the language of section 1547(a)(2).

*Amendment two* shall create a fourth safe harbor in which the President may act without congressional authorization.<sup>191</sup> This safe harbor is

Army officials whether Russian soldiers would be exposed to any sensitive technology or classified information during their visit." *Id.*

It strains both credulity and common sense that the United States Army requires the cautionary comments of a freshman representative as a reminder about protecting sensitive technology or information. *See Deployment Hearings, supra* note 9, at 17-18 (noting the facile and unsophisticated approach to the Bosnian peace process suggested by Representative Spence).

186. Pomfret, *supra* note 158, at A36.

187. *See William Harwood, Gift, Transfer of Gear Follow Smooth Space Docking*, WASH. POST, Nov. 16, 1995, at A4 (describing the second of seven dockings between United States space shuttles and the Russian space station Mir). *See also U.S.-Russian Team Set for Space Station*, WASH. POST, Jan. 31, 1996, at A2 (announcing that one astronaut each from Russia and the United States will be the first team to fly on the international space station when it is deployed in 1998). The launch will take place at the Baikonur launch site located in Kazakhstan. *Id.*

188. The Resolution, *supra* note 3, § 1542.

189. *Id.* § 1543.

190. *Id.* § 1544(b).

191. The current section provides:

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war; (2) specific statutory authorization, or (3) a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces.

*Id.* § 1541(b).

The President, as Commander-in-Chief, is permitted to use force in such situations, two of which are precipitated by congressional action. *Id.* § 1541(c). The introduction of a fourth safe harbor, pursuant to a U.N. Security Council resolution, allows the President to deploy United States forces into hostilities without congres-

limited to situations in which the U.N. Security Council authorizes such deployments. The purpose of this amendment is twofold. First, it recognizes the post-Cold War importance of multilateral actions under U.N. guidance. Second, the amendment embraces the reality of post-Cold War engagements. In nearly every situation in which the United States has been involved since 1989, the Security Council has provided resolutions authorizing the action.<sup>192</sup> By providing the President the ability to deploy troops pursuant to Security Council authorization, much of the debate surrounding such incidents will be avoided in the future.<sup>193</sup>

*Amendment three* shall create a schedule of re-examination of the Resolution based on five-year increments. Every five years, a committee composed of leaders in the fields of international relations, United States foreign policy, academia, international trade, intelligence, defense, and official representatives of both the legislative and executive branches of government shall conduct hearings, present papers, and the like with an eye toward examining the changes occurring in international relations. The purpose of this amendment is to prevent the Resolution from once again falling behind the reality it is supposed to govern. Amendment Three's deterrent to inaction is a provision rendering the entire Resolution null if the five-year committee fails to meet and put forth suggestions aimed at fine tuning the Resolution.

Congress will eliminate a confusing and contradictory section of the Resolution by adopting these suggested amendments. Congress will also provide the President with broader powers to enforce the mandates of a U.N. Security Council. Critics of these amendments are reminded that the Security Council is comprised of five distinct nations, each armed

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sional action, much like the existing third safe harbor.

192. See *supra* note 112 and accompanying text (discussing the U.N. Security Council resolutions passed in reference to Iraq's invasion of Kuwait and the ensuing Persian Gulf War).

193. That is not to say that congressional debate on the deployment of troops overseas is either unnecessary or unwise. On the contrary, congressional debate is often the manifestation of national debate on a crisis and, additionally, helpful in focusing the President on shortcomings in his justification for the need for United States involvement in the situation.

The limitations on debate simply recognize what has been the reality since the Resolutions inception. Namely, that for all of its bluster, Congress has never stopped the deployment of troops overseas. However, threatening to do so pursuant to the Resolution is neither constructive nor helpful to any international crisis. Therefore, the hollow platform from which Congress threatens, however ineffectively, should be toppled. For additional commentary on Congress' ineffectiveness, see generally Rolph, *supra* note 5.

with a veto, a more appropriate check to unbridled executive power in the changing political environment of the post-Cold War era.<sup>194</sup>

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194. *See supra* note 115 and accompanying text (discussing the five permanent members of the U.N. Security Council and the power to kill Security Council authorizations through the use of their individual vetoes).